Roadway Express, Inc. *and* **William P. Goff.** Case 13-CA-21264

9 August 1983

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS JENKINS AND ZIMMERMAN

On 17 January 1983 Administrative Law Judge Walter J. Alprin issued the attached Decision in this proceeding. Thereafter, the Charging Party filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

[1] The Charging Party has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

In adopting the Administrative Law Judge's Decision, we note that no party at the hearing or thereafter in exceptions urged deferral to the grievance/arbitration procedures of the relevant collective-bargaining agreement. Accordingly, we do not rely on the Administrative Law Judge's discussion of *Suburban Motor Freight, Inc.*, 247 NLRB 146 (1980), and the issue of deferral in fn. 6 of his Decision.

In adopting the Administrative Law Judge's finding that Respondent's discharge of employee Goff was not motivated by Goff's objections to Respondent's supervisors' performing bargaining unit work and to Respondent's proposal for a flexible workweek, Chairman Dotson finds it unnecessary to pass on the Administrative Law Judge's finding that Goff's complaints constituted protected concerted activity.

The Charging Party claims that the Administrative Law Judge erred in finding, in fn. 4 of his Decision, that the two other employees involved in the 19 August 1980 incident involving a misuse of company time were unnamed in the record and that they also received letters of warning from Respondent. We agree with the Charging Party that the other employees were named in the record and that, according to Charging Party Goff's uncontroverted testimony, the other employees did not receive letters of warning. However, this error by the Administrative Law Judge does not affect the conclusions reached herein.

DECISION

STATEMENT OF THE CASE

WALTER J. ALPRIN, Administrative Law Judge: This case involves the discharge on February 15, 1981[1] of an employee by Respondent allegedly in violation of Section 8(a)(1) and (3) of the National Labor Relations Act. The charge herein was filed on July 1, and the complaint issued March 31, 1982. Hearing was held in Chicago, Illinois, on September 20 and 21, 1982.[2] The issues involved are, generally, whether the alleged discriminatee's activities were "concerted and protected," whether the asserted reasons for his discharge were pretextual, and whether his discharge violated the Act.

Upon the entire record, including my observations of the demeanor of the witnesses, and after due consideration of the briefs submitted, I make the following:

FINDINGS OF FACT

Respondent, Roadway Express, Inc., a Delaware corporation, is a motor common carrier operating a freight terminal at Chicago Heights, Illinois. In the year prior to the complaint, a representative period, Respondent derived gross revenues in excess of $50,000 in the course and conduct of its business operations transporting freight between the State of Illinois and points located outside that State. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Respondent further admits, and I further find, that Highway Drivers, Dock Spotters, Ramp and Meat Packing House and Allied Products Drivers and Helpers, Office Workers and Miscellaneous Employees, Local Union No. 710, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is and has been at all times material herein a labor organization within the meaning of Section 2(5) of the Act.

William P. Goff, the Charging Party herein was employed by Respondent from September 1968, to February 15, 1981, when he was discharged from his job as a dockman at the Chicago Heights terminal, as hereinafter described. Goff had been discharged twice before, once about 1972 for striking a supervisor and once about 1976 for dishonesty, but on both occasions he took the discharges to the existing grievance procedure and was reinstated.

Article 24 of the contract between Respondent and the Union provides that, except for certain classes of misconduct, "with respect to discharge or suspension . . . the Employer shall give at least one warning notice of the complaint . . . in writing" and that such "warning letters shall be effective only for a period of nine (9) months from the date issued." In practice Respondent issues warning letters for misconduct and, upon the third warning for the same type of misconduct within a 9-month period, suspends the employee for 3 days. A fourth warning letter for the same type of misconduct may be

[1] All dates are in 1981 unless otherwise specified.

[2] Respondent's unopposed motion of November 9, 1982, to correct the transcript is hereby granted.

issued with no additional discipline, but a fifth warning letter for the same type of misconduct within a 9-month period results in discharge. Individual workers are not permitted to grieve the receipt of warning letters unless accompanied by suspension or discharge, at which time any disputes underlying the disciplinary action may be reviewed.

Work rules require an employee to advise his supervisor when leaving a work area. A 10-minute break period is permitted at the end of each 2-hour work period with the exception of the lunch period. Taking an unauthorized break is referred to as "misuse of company time."

Warning letters were issued to Goff during his employment prior to the period detailed below on the following dates: in 1968, on December 30; in 1972, on June 2; in 1974, on May 8 and 13; in 1976, on January 16 and March 15; in 1977, twice on January 24 and once each on February 23 and November 30; in 1978, on March 15; and, in 1980, on April 18. Thereafter, Goff was subjected to the following disciplinary actions:

1. May 24, 1980: Two warning letters, instituted by Supervisor Adams, one for misuse of company time while talking to another dockman at a place other than his work station, and the other for threatening a supervisor. Goff testified that he had left his work area to return to his locker in the breakroom in order to get gloves, and that on his way back he observed a supervisor engaged in bargaining unit work. Goff ordered the supervisor to stop, which led to some words, alleged to include threats, and to Goff's stopping the "drag line" used in sorting freight. Goff directed a handwritten letter to the terminal manager with his side of the story and spoke to him personally, but was advised to file grievances in the future if he had any complaints. Goff, however, determined from the Union that he could file a grievance only for disciplinary action which had a direct effect on him, e.g., a suspension or discharge, but not for a warning letter and not for the actions of a foreman in performing bargaining unit work unless it resulted in a direct loss of earnings to him.

2. June 16, 1980: Warning letter instituted by Supervisor Bertrand for misuse of company time in not being in the yard, not responding to radio calls, and turning off his radio. Goff testified that a series of events took him from the yard on company business, that he had for good cause turned the radio volume down while assisting a mechanic, and that the radio battery was defective.

3. June 18, 1980: Warning letter instituted by Supervisor Domaleczny for failure to properly perform work assignment in neglecting to chock a parked trailer. Goff testified that he had chocked the trailer when he placed it at 3 a.m., and that if it was discovered unchocked at 7 a.m. it was not his fault. The warning letter did not specify when the lack of chocking was noted.

4. June 20, 1980: Warning letter instituted by Supervisor Ward for failure to properly perform work assignment in neglecting to chock a parked trailer. Goff testified that he reviewed the record of work performed by him and determined that he had not worked with the trailer in question.

5. June 24, 1980: An incident occurred in which freight fell off a trailer leaving the loading dock. Goff was orally accused of having failed to close the doors, but he responded and later established that he had not been loading that trailer.[3] The supervisors involved, Vigliotti and Balsone, claimed that Goff threatened them, and after an interview of the supervisors the terminal manager sent Goff a warning letter stating in part:

> Specifically, when confronted by Terminal Operations Managers Lou Vigliotti and Bob Balsone about who was responsible for pulling a swinging door trailer from the dock which resulted in freight falling off the trailer, you stated that you did not pull the trailer from the dock, and if you received a (warning) letter, someone would get killed. You kept saying that, "this is not a threat, but a promise." A few minutes later, in the Linehaul Department, you again repeated your threat by stating, "If I get a letter I'll bring a shotgun to seven supervisors and kill every mother-fucker supervisor here," and that, "I might go to jail but you would be dead in Hell."

Goff's testimony is, to the contrary, that when unjustly accused and threatened with a warning letter for improperly performing work, which would result in a 3-day suspension, he made a statement that if warning letters were sent without cause someone would, as apparently had recently happened in the area, get a gun and shoot up the place. Goff also testified that Supervisor Vigliotti, with whom he had no relationship beyond work, approached him privately shortly thereafter and said that ". . . 'we have orders to fire you at all costs because of your big mouth . . .'" but that he would deny the conversation if ever asked about it because he did not want to lose his job. Vigliotti testified and denied such conversation. Considering that Vigliotti had no relationship with Goff as would prompt such a damaging admission, I credit Vigliotti's denial. Goff grieved the suspension for his third instance of threatening a supervisor within a 9-month period, but his appeal was denied. In the grievance, Goff made no reference to the alleged statement of Vigliotti.

6. August 19, 1980: Warning letter and 3-day suspension instituted by Assistant Terminal Manager Milanowski for misuse of company time. Goff testified that he had left his work area to get a drink of water in the breakroom and there met two other employees.[4] As this was the third instance within a 9-month period of misuse of company time, Goff was suspended for 3 days, which action he unsuccessfully grieved.

7. September 19, 1980: Warning letter instituted by Assistant Terminal Manager Holzer for misuse of company time after being discovered in the breakroom 13 minutes after the start of the shift, visiting with other employees who also were issued warning letters. Goff testified that he had returned to the breakroom after learning of his assignment in order to obtain appropriate gear. This

[3] A warning letter for failure to properly perform work assignment was sent to the responsible employee.

[4] The other employees, though unnamed, were also issued letters of warning for misuse of company time. Their testimony was not presented.

being the fourth warning for the same offense, no other disciplinary action was taken.

8. October 6, 1980: Warning letter instituted by Supervisor Bertrand for failure to properly perform work assignment, in not identifying one loose and two missing tire lugs during a safety check. The letter cited two previous warnings for failure to properly perform work within a 9-month period, but no suspension was imposed. Goff testified that the missing lug could only have been discovered by shining a light into the recesses where they fit and the loose lugs discovered only by testing all lugs, neither of which procedures was normally done during a safety check. Goff further testified that this was the only instance of which he was aware that a warning letter was issued for such offenses. As support he produced two work repair orders, one to tighten lugs and one to replace a tire, which he alleged did not result in discipline.

9. February 15, 1981: Letter of warning with discharge, instituted by Supervisors Bottoms and Balsone for misuse of company time in beginning a break early and extending it beyond regular time. The letter states that a supervisor observed Goff in the breakroom lying on a bench with his coat off before the start of his authorized break and that another supervisor, noting that Goff had not returned to work at the end of the break period, went to the breakroom and found him with his coat off standing at his locker. The letter reports that Goff stated, "I hope you know this will cost me my job." In response to other alleged statements, Supervisor Bottoms also instituted a warning letter for threatening both supervisors. Goff testified to the contrary, that he took his break at the proper time, left the breakroom at the proper time with three other employees, that when he got to this work area his supervisor told him that he was late and would receive a warning letter, and that he worked to the end of his shift and learned of the discharge only when he reported the next workday. Two employees were called by the General Counsel as witnesses to this incident. Both testified that Goff was in the breakroom when they entered and that, with another employee, they played cards during the break while Goff sat on a bench and read his Bible. One witness stated that as he left the breakroom, Supervisor Balsone entered and the employee looked back and saw Goff still standing at his locker, while the other witness testified that Balsone came into the room when the break was only half over and that the employees all left together at the end of the break. The witnesses provided Goff with notarized statements which he used to grieve his discharge, but his appeal was denied.

The General Counsel contends that Goff was given these warnings and suspensions, and ultimate discharge, because he was outspoken in his objections to supervisors performing bargaining unit work and because of his vigorous opposition to the attempts of Respondent to institute a "flexible work week." There is no doubt but that Goff was known to object to supervisors performing unit work. It is attested to by fellow employees, and was the topic of a complaint directly to the terminal manager.

The workweek then ran from Monday through Friday with employees paid time and a half for Saturdays and double time for Sundays. In a flexible workweek, the starting day of the week would be staggered, with some employees beginning their 5-day week on each progressive day of the week, with time-and-a-half overtime pay for their sixth day of work and double time for their seventh day. Respondent was losing freight because of overtime costs, and at the end of 1980 rumors abounded that Roadway would try to institute the flexible workweek. A number of employees had been laid off, and while a flexible workweek would reduce the pay of senior employees who could bid in the Saturday and Sunday work, it would permit laid-off employees to be recalled and new employees added to avoid the need for overtime. The fact that the union business agent was informally polling employees also made it clear that a flexible workweek was under consideration.

Goff testified, and his testimony was supported by others, that among the employees he was an active and vocal opponent of the flexible workweek. He testified also that one discussion session among employees, in which he was outspoken in opposition, was overheard by management representatives. Since this assertion is undisputed, it is credited. It is also clear that Respondent considered the acceptance by employees of the flexible workweek to be highly important.

In addition to Goff's testimony that a supervisor had told him that Respondent wanted to get rid of him, another witness testified that, while unobserved, he overheard two supervisors state that they had to get rid of Goff because of his opposition to the flexible workweek and his continuing objection to supervisors doing work reserved to bargaining unit members. The conversation was denied by the one supervisor identified. Having observed the demeanor of the employee while testifying to this conversation, and his failure to adequately explain the tardy circumstances of repeating the conversation to Goff, I do not credit him that such a conversation in fact took place.

Discussion

A. *Concerted Activity*

Goff was involved in two activities claimed to be concerted and protected. Goff objected verbally and physically to Respondent concerning supervisors violating the union contract by performing bargaining unit work and raised verbal objections to other employees concerning an employer's proposal for a flexible workweek which directly affected overtime pay computation. Respondent argues that these activities were not concerted. It emphasizes that the objection to supervisors doing unit work was raised with no intent of filing a grievance or organizing other employees to protest, and constituted no more than the "gripe" of an individual employee. It also argues that Goff's objection to the flexible workweek was prompted by the possibility of personal loss of overtime income available to him by reason of his seniority, that the objection operated against the interests of less senior unit employees, and that the objection was not a

current issue since a vote was not taken on it until a month after Goff's discharge.

I disagree with Respondent's position as to both activities, and find them to have been concerted and protected. When supervisors perform bargaining unit work in violation of the union contract, the rights of all members of the unit are threatened and any act of objection has the effect of aiding all unit members. Likewise, activities relating to the method by which compensation is to be paid for regular and overtime periods relates to all unit members. "The activity of an employee may be held to be concerted if the subject matter of [the] complaint was 'of moment to the group' . . . or related to a matter of common concern . . . . The test of the prohibited [sic—possibly should be "protected"] nature of [the] activity is not whether [the] position had merit . . or was even reasonable . . .; rather, the test is whether [the] activity related to a matter of common concern."[5]

B. *Pretextual Nature of Warnings*

It is alleged that the timing, number, and nature of the various warning letters issued to the Charging Party by Respondent evidence its intent to discharge him because of his concerted and protected activities. It therefore becomes necessary to review each of the warning letters, the suspensions, and the discharge proven by the General Counsel, in order to determine the extent, if any, that they were pretextual.[6]

The timing of these disciplinary matters does not indicate any scheme by Respondent to "get" Goff. Goff had been vocal in his objection to supervisors performing bargaining unit work all through his period of employment with Respondent, and there is no showing that Respondent's attitude toward this had changed during the final period of his employment. Goff's objection to the split workweek proposal obviously did not arise until it became known to him at the end of 1980 and could not possibly have affected Respondent's attitude toward him prior to that late date. I find that the warning letters and disciplinary actions have not been shown by their number or timing to have been pretextual in nature.

As to the *bona fides* of the individual warnings, I find that two of them were not warranted. Regarding the warning letter of October 6, 1980, for failing to properly perform a safety inspection, though checking for loose or missing lugs would appear by common sense to be of safety importance, Respondent did not contradict Goff's evidence that such failure was not ordinarily treated as a disciplinary matter. However, Goff had been issued two prior warnings for improperly performing work assignments, and it can be assumed from Respondent's failure to impose a suspension on this third instance it recognized that the warning letter of October 6 had not been warranted. Had Respondent intended the warning as a pretext for discharge it could have fabricated a "misuse of company time" offense which would have resulted in discharge, rather than bringing an ineffective charge of failure to properly perform work assignment. I also would find that the warning letter of June 20, 1980, for failure to chock a trailer was not warranted. However, Goff had apparently already convinced Respondent of that fact as later warning letters for the same type of offense did not cite this instance.

The warnings for misuse of company time I find to have all been justified. In the instances of May 24 and August 19, 1980, Goff had left his work area without advising his supervisor, as required by work rules. That he discovered a supervisor violating the union contract while on an unauthorized break does not rectify Goff's behavior. I do not believe Goff's denials as to the other instances of misuse of company time, on June 16, 1980, and February 15, 1981. In the former there was no confirmation from the mechanic Goff claimed to have been assisting while "turning the radio down," and Goff offered no reasonable excuse for failing to contact his supervisor for 35 minutes after returning from a regular break. In the latter instance, the witnesses supporting Goff could not testify to the charge that he began his break early, and disagreed with each other or with Goff as to the entrance of the supervisor and whether or not they all left together.

There are additional conflicts in testimony. Goff denies having threatened Supervisor Adams on May 24, 1980, having failed to chock a trailer on June 18, 1980, as charged by Supervisor Domalczny, having threatened Supervisors Vigliotti and Balsone on June 24, 1980, and having threatened Supervisor Bottoms on February 15, 1981, the date of his discharge. While none of these charges go to the cause of discharge, the credibility issue relates to the General Counsel's theory of the discriminatory nature of the warning letters. All of these instances, except the last, took place well before Goff's protected activities regarding the flexible workweek proposal, and well after the start of Goff's complaints regarding supervisors doing bargaining unit work. I do not believe that the warning letters were responses to those protected activities. In view of this, and of the number of other instances in which I have been unable to credit denials by Goff, I do not credit Goff's testimony as to these instances.

I find that though Goff was engaged in concerted and protected activities, his discharge was not motivated by those activities, and was not in violation of Section 8(a)(1) and (3) of the Act.

Upon the basis of the above findings of fact and the entire record in this case, I make the following:

CONCLUSIONS OF LAW

1. Roadway Express, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Highway Drivers, Dock Spotters, Ramp and Meat Packing House and Allied Products Drivers and Helpers, Office Workers and Miscellaneous Employees, Local Union No. 710, affiliated with the International Brother-

[5] *Fall River Savings Bank*, 247 NLRB 631, 632–633 (1980). See also *Timet, A Division of Titanium Metals Corporation of America*, 251 NLRB 1180, 1188, fn. 29 (1980). Regarding seniority as a matter of common interest, see also *Red Ball Motor Freight, Inc.*, 253 NLRB 871 (1980).

[6] Though there was opportunity at the grievance hearings to consider whether Respondent was engaged in unfair labor practices, that issue was not presented or considered. The Board therefore does not defer to the findings of the grievance committee, *Suburban Motor Freight, Inc.*, 247 NLRB 146 (1980), and independent findings are made herein.

hood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

3. The General Counsel has not established by a preponderance of the evidence that Respondent has interfered with, restrained, or coerced complainant in his exercise of rights guaranteed in Section 7 of the Act, or discriminated in regard to the hire or tenure or terms or conditions of employment of its employees to encourage or discourage membership in any labor organization.

Upon the foregoing findings of fact and conclusions of law, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[7]

The complaint is dismissed in its entirety.

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[7] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.